79-1593

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-

GULF OIL CORPORATION, SCALLOP NUCLEAR INC. and GENERAL ATOMIC COMPANY,

Petitioners,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioners, Gulf Oil Corporation, Scallop Nuclear Inc. and General Atomic Company pray that a writ of certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania entered in these proceedings on September 28, 1979.

OPINIONS BELOW

The Opinion of the Superior Court of Pennsylvania, not yet reported, is set forth as Appendix A to this Petition.

Petitioners appealed to the Superior Court of Pennsylvania from Paragraph 5 of the Order of the Court of Common Pleas of Lehigh County, Pennsylvania dated

June 21, 1978; a copy of that Order is set forth as Appendix B. On March 1, 1979, while the appeal to the Superior Court was pending, the Court of Common Pleas of Lehigh County issued an Order and Memorandum Opinion supplementing its June 21, 1978 Order; that Order and Memorandum are set forth as Appendix C to this Petition. The March 1, 1979 Opinion incorporated by reference a prior Opinion by the Court of Common Pleas of Lehigh County dated March 30, 1976; the Opinion of March 30, 1976 is set forth as Appendix D.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on September 28, 1979. A timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on January 14, 1980, and this Petition is filed within 90 days of that date.

The Court's jurisdiction is invoked under 28 U. S. C. § 1257(3). The judgment of the Superior Court, although rendered on an interlocutory basis, concerned solely the issue of venue. Because venue is "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action," this Court recognized in *Mercantile National Bank v. Langdeau*, 371 U. S. 555, 558 (1963), that "it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine [before trial] in which state court appellants may be tried [or, in the present case, in which state court petitioners must defend themselves] rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." The *Langdeau* rule was applied in a procedural context essentially identical to the present case in *American Motorists Insurance Co. v. Starnes*, 425 U. S. 637, 642 n. 3 (1976).

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects defendants from defending a $274 million (or greater) claim against them in a county where virtually every potential juror is a customer of the plaintiff utility and may therefore derive a pecuniary benefit of as much as $289 in the form of decreased electric bills if the plaintiff prevails.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1. . . . [Nor] shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-respondent Pennsylvania Power & Light Company ("PP&L") brought this action in the Court of Common Pleas of Lehigh County, Pennsylvania against General Atomic Company, a partnership, and Gulf Oil Corporation and Scallop Nuclear Inc., the partners (hereinafter referred to collectively as "General Atomic"). PP&L alleges that its negotiations with Gulf United Nuclear Fuel Corporation (the predecessor to General Atomic) produced a contract for future nuclear fuel fabrication services (including uranium), that General Atomic repudiated that contract, and that PP&L has suf-

fered damages of between $229 and $274 million (or more [1]) as a result.

PP&L has demanded a trial by jury, and the jury trial is now scheduled to start on September 22, 1980 in Lehigh County, Pennsylvania.

B. General Atomic's Petition for Change of Venue

Citing the Fourteenth Amendment Due Process Clause and a Pennsylvania change of venue statute, General Atomic petitioned the Court of Common Pleas of Lehigh County, Pennsylvania to grant General Atomic a change of venue. General Atomic contended that it was entitled to a change of venue since in Lehigh County, the county where PP&L had chosen to file the action, virtually every potential juror was a customer of PP&L and, as such, would benefit by a reduction in electric bills if a verdict and judgment were rendered in PP&L's favor. General Atomic asked that the case be transferred to any of the 47 counties in Pennsylvania (out of a total of 67 counties) in which PP&L does not provide electric service to the majority of the population.[2]

In accordance with Pennsylvania procedure, General Atomic and PP&L deposed five witnesses on the issues raised by General Atomic's Motion. Their testimony established these facts:

(1) If PP&L recovers damages as sizeable as those it seeks ($229 to $274 million or more), the

1. Having already increased its claim once (from $89-$114 million to $229-$274 million), PP&L has continued in its pleadings and discovery responses to reserve to itself the right to increase its damage claims further.

2. Among the 47 counties to which this case could be transferred are three counties contiguous to Lehigh County (Berks, Bucks and Montgomery) as well as Philadelphia County (with no PP&L customers), which is only 47 miles from Allentown, the Lehigh County seat.

Pennsylvania Public Utility Commission ("PUC") will dictate how PP&L must treat that recovery and, as PP&L's Vice-President and Comptroller candidly admitted, the tendency of any PUC ruling would be to reduce the electric bills to PP&L's customers.[3] Superior Court Opinion at A4-A5.

(2) Although the benefit would go to PP&L's customers in one way or another, no one can say with any degree of certainty when or by exactly how much the electric bills of PP&L's customers would be reduced as a result of a verdict and judgment in PP&L's favor.[4]

(3) PP&L provides electric service to 98.5% of the households of Lehigh County.[5]

(4) If PP&L were to recover the $229 to $274 million which it has most recently claimed as its damages, the potential benefit to each household in

3. In its Brief In Opposition to General Atomic's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, PP&L found it necessary to disavow its own Vice President and Comptroller and to argue to the Supreme Court that he had not testified that a substantial recovery by PP&L would tend to reduce the electric bills of PP&L's customers. PP&L based this argument solely on the Superior Court's fact conclusion that since no one can predict with certainty what the PUC will rule, a future benefit to PP&L's customers is only a "possibility." PP&L's own witness, however agreed with General Atomic's witness that the effect of *any* ruling the PUC might make would be (not "might be") to lower the electric bills to PP&L's customers. *See* page 9, *infra*.

4. *See* page 9, *infra*.

5. In its briefs throughout this litigation, PP&L has consistently attempted to reduce this percentage by defining a "customer" as the single person in a PP&L-served household to whom PP&L addresses its monthly electric bill. Using this definition, PP&L is able to claim that only 44.9% of the residents of Lehigh County are its "customers". PP&L thus characterizes the spouse of the addressee in a PP&L-served household as a "non-customer" and contends that trial before a jury composed of such spouses would not violate fundamental precepts of due process.

Lehigh County would be between $242.12 and $289.86 in reduced electric bills, although that benefit might be spread over several years.[6] (If PP&L revises its damage claims upward again, the size of the stake which each PP&L customer would have in the outcome of the case would also rise proportionately).

(5) An awareness of the possibility of such a substantial benefit would color the jurors' perception of the evidence and would prejudice them against General Atomic.

After briefing and argument, the Lehigh County Court of Common Pleas denied General Atomic's motion for change of venue but certified the question of venue for interlocutory appeal to the Superior Court of Pennsylvania.[7]

The Superior Court allowed General Atomic to appeal but thereafter affirmed the decision of the Court of Common Pleas, holding against General Atomic on both the Pennsylvania statutory question and on the due process issue.

6. The $242.12 to $289.86 figures are General Atomic's calculation. The Superior Court accepted these figures *arguendo* in deciding the case.

When PP&L was claiming "only" $89 to $114 million in damages, it calculated that the pass-through to each PP&L customer would be $43.43 to $56.09. PP&L increased its damage claim to $229 to $274 million or more while the case was on appeal to the Pennsylvania Superior Court, and has not had occasion to re-calculate the pass-through based upon the new, larger damage claim. By extrapolation, however, it appears that PP&L should now calculate the pass-through to the average customer as between $112.34 and $134.50 compared to General Atomic's calculation of $242.12 to $289.86.

The decision of the due process issue does not require that the discrepancy between these figures be resolved; petitioners submit that even PP&L's lowest figure of $43.43 (based upon its now outdated damage claim) is a significant pecuniary interest, substantially larger, for example, than the $12.00 pecuniary interest found to be prejudicial in *Tumey v. Ohio*, 273 U. S. 510, 523 (1927).

7. The Court of Common Pleas made no findings of fact on the various issues raised by General Atomic's Petition and PP&L's response.

General Atomic filed a timely Petition to the Supreme Court of Pennsylvania for Allowance of an Appeal from the judgment of the Superior Court. On January 14, 1980, the Supreme Court of Pennsylvania, without reaching the merits of the venue question, denied General Atomic permission to appeal from the judgment of the Superior Court. (Appendix E)

C. The Stages in the Proceedings and the Manner in Which the Federal Question Sought to Be Reviewed Was Raised

General Atomic raised the federal constitutional issue of due process in its initial Memorandum of Law in support of its Motion (Appendix F), renewed its due process argument in its Reply Brief on its motion (Appendix G), and continued to press the issue in its Brief (Appendix H) and Reply Brief (Appendix I) to the Superior Court and in its Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. (Appendix J) The Superior Court expressly considered the federal issue in its Opinion, as quoted immediately below.

D. The Opinion of the Superior Court of Pennsylvania

The Superior Court rejected General Atomic's ("GAC's") due process claim in the following two paragraphs[8] (A26-A27; footnotes omitted):

> GAC's argument that the lower court has violated its right to due process of law as guaranteed by the

8. The Superior Court's resolution of the due process issue also apparently incorporated its holding with regard to the Pennsylvania change of venue statute that it was inappropriate to balance PP&L's reasons for wanting to try this case to a Lehigh County jury against the risk of prejudice to General Atomic. *See* pages 14-15, *infra*.

fourteenth amendment of the United States Constitution also fails to persuade us.

While it is settled that "[t]he constitutional standard of fairness [under the due process clause] requires that a defendant have 'a panel of impartial, indifferent jurors,'" *Murphy v. Florida*, 421 U. S. 794, 799 (1975), *quoting Irvin v. Dowd*, 366 U. S. 717, 722 (1961), GAC has the burden of proving that it cannot obtain such a panel in Lehigh County. *See Irvin v. Dowd, supra.* GAC's argument with respect to due process, like its argument with respect to change of venue under the Act of 1875, depends upon its contention that the veniremen of Lehigh County have, and believe that they have, an interest in the case adverse to GAC. We have concluded, however, that GAC has not shown such an interest. While it is true that a violation of due process may be found where the tribunal has a pecuniary interest in the outcome of the case such that unfairness by the tribunal can be assumed, *see Tumey v. Ohio*, 273 U. S. 510 (1927), we will not assume unfairness, and therefore will not find a violation of due process, where the only interest shown is a speculative and perhaps insignificant [9] possibility of some future benefit. As to GAC's concern that some of the PP&L customers believe that they will benefit, this belief, if indeed it does exist, is something that we believe can be satisfactorily discovered on voir dire.[10]

The Superior Court's characterization of the benefit to PP&L's customers as only a "possibility" is misleading.

9. Inherent in the phrase "*perhaps* insignificant," of course, is the recognition that the benefit may perhaps be significant.

10. The Superior Court's suggestion that the problem can be solved on *voir dire* is unrealistic. Asking jurors if their neutrality would be impaired by their financial interest would create more bias than it eliminates. *See also* pages 13-14 n. 16, *infra.*

Earlier in its Opinion, the Superior Court set forth its finding on the question whether any damages recovered in this lawsuit by PP&L would be passed through to PP&L's customers (A4-A5; footnote omitted, emphasis added):

> [Two witnesses] testified that the PUC would have to rule on how a recovery of damages as large as the one sought by PP&L should be treated. They testified that they did not know how the PUC would in fact rule. Mr. Vanderslice [PP&L's Vice President and Comptroller] testified, however, that it was doubtful that the PUC would permit PP&L to distribute any of the damages to its shareholders, and *he admitted that the tendency of any PUC ruling would be to reduce the electric bills to PP&L's customers.* Mr. O'Hara [a former Commissioner of the Pennsylvania Public Utiilty Commission] also testified that the damages would not go to the shareholders. He suggested three different ways in which the PUC might rule: . . . . *All of these possible rulings would result in lower electric bills to PP&L customers,* but this benefit, according to Mr. O'Hara, could be spread over a period of several years.

Thus, as shown by the Superior Court's own summary, the record justifies the use of the word "possibility" only in the sense that there are several different possible ways in which the benefit may be passed through to PP&L's customers. Except on this interpretation, the record contains not one iota of evidence to justify the Superior Court's characterization of the benefit to PP&L's customers as "speculative" or as only a "possibility."

REASONS FOR GRANTING THE WRIT

I. The Superior Court of Pennsylvania Has Decided a Federal Constitutional Question of Substance Not Heretofore Determined by This Court.

This Court has never determined the extent to which, if at all, due process is violated by a trial to a jury whose members each have a pecuniary interest in the outcome of the case. This Court has addressed the related question of an adverse pecuniary interest on the part of judges, *Ward v. Village of Monroeville*, 409 U. S. 57 (1972); *Tumey v. Ohio*, 273 U. S. 510 (1927), and arbitrators, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U. S. 145 (1968), and has observed generally that a case "in which the adjudicator has a pecuniary interest in the outcome" is one as to which "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Winthrow v. Larkin*, 421 U. S. 35, 47 (1975). Neither this Court nor any state supreme court nor any United States Court of Appeals, however, has had occasion to apply due process principles to a case such as this where it is jurors who have a pecuniary interest in the outcome of the case. Two trial courts have faced the issue of jury bias and have reached opposite conclusions,[11] *compare Long Island Lighting Co. v. New England Petroleum Corp.*, 80 N. Y. Misc. 2d 183, 362 N. Y. Supp. 2d 350 (Sup. Ct., Special Term 1974),[12] *with Virginia Electric*

11. The question of bias in a case where all jurors are customers of a plaintiff electric company was also raised in *Consumers Power Co. v. Combustion Engineering*, United States District Court for the Western District of Michigan, No. K 74-323 CA 8. By a Consent Order entered in that case (reprinted as Appendix K to the present petition), the venue was changed to a court in which prospective jurors were not ratepayers of the plaintiff.

12. *Long Island Lighting* was a $62,000,000 breach of contract action by a utility ("Lilco") against a fuel supplier. The New York

& Power Co. v. Sun Shipbuilding & Dry Dock Co., 389 F. Supp. 568 (E. D. Va.),[13] but the only appellate authority on the issue consists of the two conclusory paragraphs in the Opinion by the Superior Court of Pennsylvania in the present case.

The question of due process in a civil jury trial is an important and fundamental one, with implications for many civil actions. The importance of the issue justifies

12. (Cont'd.)
court granted defendant's motion for a change of venue because of potential jury bias. 80 N. Y. Misc. 2d at 186-88, 382 N. Y. Supp. 2d at 354-55:

> With respect to the jurors of Nassau County, this court must consider not only the possibility of an unconscious bias that may be submerged in their minds as it relates to the issue but the appearance of it as well. . . .
>
> This court is concerned that depending upon a recovery by Lilco in this action, even if rebates will not nor cannot be made to plaintiff's customers, jurors will assume that such might occur or that future rights might be affected by reduced fuel costs or increased funds available to Lilco. To even examine jurors concerning such an assumption on voir dire would raise the danger of unduly emphasizing prejudicial material.
>
> • • •
>
> Considering the situation with which the court is confronted, [and] the magnitude of this litigation, . . . this court believes that the interests of justice will better be served by a transference of this action to another county. Pragmatically, the difficulty of selecting a jury will be reduced vastly. . . . Lilco's electricity charges are so intimately connected with the cost of living of all residents of Nassau County that in the present atmosphere there is sufficient risk of a possible subliminal bias that requires the matter be transferred from Nassau County.
>
> Accordingly, this motion [for change of venue] is granted.

13. In *Virginia Electric*, the defendant's motion for change of venue was denied chiefly on the ground that it was not certain on the record in that case that a recovery by the plaintiff utility would be passed through to the utility's customers. In the present case, both parties' witnesses testified that any recovery by PP&L would be passed through to PP&L's customers. *See* Superior Court Opinion at A4-A5.

examination by this Court and the establishing of guidelines for future trials. This Court can provide such guidelines only if it grants the writ of certiorari in the present case.

The Pennsylvania Superior Court's treatment of the issue—which is now the only appellate authority from any jurisdiction—is inadequate, particularly in its apparent assumption [14] that jurors and judges will be equally able to maintain impartiality in spite of potential pecuniary benefit to themselves and its implied conclusion that an interest which it deems too insignificant to "offer a possible temptation," *Tumey v. Ohio,* 273 U. S. 510, 532 (1927), to the average judge must be regarded as also offering no temptation to the average juror. This equation of jurors with judges is contrary to the usual experience of judges and lawyers that has resulted, for example, in the rule that the same prejudicial information which a judge is presumed capable of disregarding may lead to reversible error if admitted into evidence in a trial to a jury. *See McCormick on Evidence,* 360 (2d ed. 1972).[15]

II. The Decision of the Superior Court of Pennsylvania Conflicts in Principle With Applicable Decisions of This Court.

The Superior Court's Opinion is inconsistent with this Court's decisions in cases involving judges, quasi-judicial administrative tribunals and arbitrators which

14. *See, e.g.,* the Superior Court's citation at A19 to *In re Virginia Electric & Power Co.,* 539 A. 2d 357 (4th Cir. 1976).

15. General Atomic has long recognized this difference. It has not only never sought to disqualify the Lehigh County trial judge assigned to this case but, on the contrary, has expressed its willingness to have that judge preside at trial, so long as the case is tried to a non-Lehigh County jury.

hold that it violates due process to force a litigant to try his case before a finder of fact who has a pecuniary interest in the outcome.

The Superior Court, for example, has said that it does not violate the Fourteenth Amendment's guarantees of due process to permit a person to sit on a jury where there is only a possibility that he will receive a substantial future benefit depending upon the outcome of a case. The test established by this Court in *Tumey v. Ohio,* however, is that "the slightest pecuniary interest" (on the part of a judge) is disqualifying. The Superior Court's decision in the present case cannot be reconciled with *Tumey.*

The Superior Court of Pennsylvania has also apparently decided that even in this age of constantly escalating energy costs, the interest of an electric company's customer in the outcome of an attempt by his company to gain $274 million or more from a source other than its own customers is too indirect to implicate the Due Process Clause. In *Ward v. Village of Monroeville, supra,* however, this Court held that a mayor who had no personal stake in the outcome of a case and whose salary did not even depend on the amount of fines he imposed was nevertheless barred from acting as a judge in a court where the municipality depended on fines which the court imposed for a substantial portion of its funds.

Another instance of inconsistency with this Court's decisions is the Superior Court's holding that in order for a litigant to invoke his due process guarantees he must not only show that the finder of fact has an interest in the outcome but affirmatively demonstrate that the finder of fact is aware of the extent of that interest. Not only is this impossible in a jury trial [16] but *Tumey, Ward* and *Commonwealth Coatings* require no such showing.

16. The Superior Court's Opinion completely ignores the reality of a jury trial. No litigant can ever prove *prior* to trial

The Superior Court also implicitly rejected General Atomic's suggestion that it weigh PP&L's reasons for trying the case in Lehigh County against the risk of prejudice to General Atomic.[17] The mechanistic rule of thumb that a plaintiff's choice of forum should be respected is no substitute for a careful balancing of the competing interests, a process which this Court has deemed appropriate

16. (Cont'd.)
what beliefs or knowledge one or more jurors are likely to acquire during trial and any attempt to prove *after* trial that one or more jurors possessed prejudicial information will usually be futile in view of the black letter rule that a jury verdict cannot be impeached.

The Superior Court is unrealistic in supposing that potential prejudice on the part of the Lehigh County jurors who will hear this case can be neutralized by educating them during *voir dire* to the various ways in which their electric bills could be reduced by a big verdict and questioning them about how that knowledge, given to them by counsel, might influence their deliberations; such a *voir dire* could have no effect but to sow the very seeds of prejudice which General Atomic wishes to avoid.

17. As the Superior Court acknowledged, the witnesses and sources of proof in this case are scattered all over the nation, PP&L's trial counsel is in Philadelphia County (and Philadelphia is one of the counties not served by PP&L where the trial of this case could safely be held), the documentary evidence, because of discovery, is located in Philadelphia, and the costs of holding trial outside of Lehigh County would be negligible, particularly in view of the magnitude of the case. Thus, PP&L has no obvious reason for wanting to try this case in Lehigh County other than its apparent belief (which General Atomic shares) that the Lehigh County jurors will vote to decrease their electric bills.

Although counsel for PP&L has never been required to state why he has fought so vigorously to keep this case in Lehigh County, no doubt he is well aware of the significant advantage a home-town litigant enjoys in a case of this sort. In *United Nuclear Corp. v. General Atomic Company*, for example, three decisions by this Court were required before a state court in Santa Fe, New Mexico would permit General Atomic to pursue its federal arbitration rights against the home-town party, United Nuclear Corporation. *See General Atomic Company v. Felter*, 429 U. S. 973 (1977), 434 U. S. 12 (1977), 436 U. S. 493 (1978). And even this right was achieved only after the home-town court had entered a billion dollar default judgment against General Atomic, which judgment is now on appeal to the New Mexico Supreme Court.

in other due process contexts. *See, e.g., Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 894-95 (1961).

CONCLUSION

The Superior Court of Pennsylvania has decided an important constitutional question regarding the due process right to trial before an unbiased jury. The decision by the Superior Court conflicts in principle with applicable decisions of this Court. Accordingly, a writ of certiorari should issue for review of the judgment and opinion of the Superior Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

No. 3051

OCTOBER TERM, 1978

PENNSYLVANIA POWER & LIGHT COMPANY

v.

GULF OIL CORPORATION,
SCALLOP NUCLEAR INC. and
GENERAL ATOMIC COMPANY,
Appellants

APPEAL FROM PARAGRAPH 5 OF THE ORDER DATED JUNE 21, 1978 OF THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, JANUARY TERM, 1975, NO. 453.

EN BANC

BEFORE: CERCONE, P. J., AND PRICE, VAN DER VOORT, SPAETH, HESTER AND WIEAND, JJ.

OPINION BY SPAETH, J.: FILED September 28, 1979

On November 6, 1974, Pennsylvania Power & Light Company (PP&L) started the present action in assumpsit

against General Atomic Company (GAC) and GAC's partners, Gulf Oil Corporation and Scallop Nuclear, Inc. The complaint was filed in Lehigh County and alleged that in the fall of 1973, PP&L had entered into a contract with Gulf United Nuclear Fuel Corporation, a predecessor of GAC, for the delivery of uranium and fuel fabrication devices, and for various services, to PP&L's nuclear power plants, and that in 1974 GAC had repudiated this contract, causing damages in excess of $10,000. PP&L requested a trial by jury. GAC filed an answer to the complaint, in which it denied the existence of any contract, raised other defenses, and pleaded various counterclaims. GAC also filed an application for change of venue, alleging, *inter alia*,[1] that it could not obtain a fair trial because a large number of the inhabitants of Lehigh county were customers of PP&L and therefore had an interest in the case adverse to GAC. On March 30, 1976, the lower court denied this application. PP&L subsequently answered interrogatories propounded by GAC, in which it estimated its damages to be from $88,642,525.60 to $114,471,031.60 or more.[2] On December 15, 1977, GAC petitioned the lower court to reconsider its order of March 30, 1976, denying GAC's application for change of venue.[3] On January 4, 1978, PP&L filed an answer to GAC's petition

1. In its application GAC also alleged that it could not obtain a fair trial in Lehigh County because of "substantial pre-trial publicity." In support of this allegation GAC attached to its application several reports that had appeared in local newspapers in November 1974, when PP&L started the present action.

2. At the time it answered GAC's interrogatories PP&L reserved the right to amend its answer to interrogatory number 47, which concerned the amount of damages. PP&L has since amended its answer to claim damages of $229,288,406 to $274,493,522 or more.

3. GAC did not allege "substantial pre-trial publicity" as a ground for reconsideration, *see* note 1 *supra*, and it has not argued on this appeal that its petition for reconsideration should have been granted because of such publicity.

for reconsideration,[4] and after depositions[5] and oral argument, the lower court, by order of June 21, 1978, denied the petition for reconsideration. On October 4, 1978, at GAC's request, the lower court certified its order of June 21 for interlocutory appeal,[6] and on December 27, 1978,

4. PP&L states that the matter was essentially ready for trial by the end of 1978 and has accused GAC of attempting to delay the trial. In support of its accusation of attempt to delay PP&L points to the fact that GAC did not petition the lower court to reconsider its order of March 30, 1976, until December 15, 1977. GAC excuses the delay in filing the petition for reconsideration on the ground that PP&L did not disclose the amount of damages it was seeking until November 30, 1976; before that time, GAC says it did not have a complete factual record upon which to make its argument with respect to the issue of jury prejudice. GAC further excuses the delay on the ground that both it and PP&L had filed motions for summary judgment, the granting of either of which would have rendered an application for change of venue superfluous. After the lower court had denied the motions for summary judgment, on September 19, 1977, according to GAC the venue issue was no longer superfluous and it therefore filed the petition for reconsideration. GAC also asserts that PP&L's statement that the matter was essentially ready for trial by the end of 1978 is belied by the fact that on March 15, 1979, PP&L amended its damage claim upward to $229,288,406 to $274,493,522 or more.

5. The depositions were taken pursuant to Pa. R. C. P. No. 209.

6. The order of the lower court was as follows:

> And Now, this 4th day of October, 1978, after consideration on briefs of the parties hereto of [GAC's] petition for amendment of the interlocutory court order entered June 21, 1978 denying [its] motion for change of venue and transfer, it appearing that the damages involved in the case are allegedly substantial; that trial is expected to be lengthy and commensurate with such alleged damages, and that it would be a miscarriage of justice to incur the time and expense of trial only to have the judgment of this court reversed for error in determining this initial motion to transfer; that this court is of the opinion and specifically finds that its decision to deny the motion for transfer involves a controlling question to which there is a substantial ground for difference of opinion; that an immediate appeal from the order may materially advance the ultimate determination of the litigation, and based upon this finding,

this court permitted the appeal.[7]

In support of its argument that it cannot obtain a fair trial in Lehigh County, GAC cites the deposition testimony of George Vanderslice, PP&L's Vice President and Comptroller, and William O'Hara, a former Commissioner of the Pennsylvania Public Utility Commission (PUC). Both men testified that the PUC would have to rule on how a recovery of damages as large as the one sought by PP&L should be treated. They testified that they did not know how the PUC would in fact rule. Mr. Vanderslice testified, however, that it was doubtful that the PUC would permit PP&L to distribute any of the damages to its shareholders, and he admitted that the tendency of any PUC ruling would be to reduce the electric bills to PP&L's customers. Mr. O'Hara also testified that the damages would not go to the shareholders. He suggested three different ways in which the PUC might rule: either (1) reduce the rate base of PP&L's Susquehanna nuclear plant; or (2) allow a reimbursement under the fuel adjustment clause; or

6. (Cont'd.)

IT IS ORDERED that [GAC] may seek an immediate appeal as provided by Section 702(b) of the Judiciary Act of 1976, 42 Pa. C. S. A. § 702(b).

R. at 874a-75a.

7. Jurisdiction of this court is pursuant to the Act of July 9, 1976, P. L. 586, No. 142, as amended by Act of April 28, 1978, No. 53, 42 Pa. C. S. § 702(b), which provides:

> "When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa. C. S. § 702(b). *See also* Pa. R. A. P., Rules 312, 1311.

(3) permit PP&L to retain the damages recovered for additional capital investments. All of these possible rulings would result in lower electric bills to PP&L customers, but this benefit, according to Mr. O'Hara, could be spread over a period of several years.[8] Based upon this testimony, and using population and PP&L customer figures, GAC calculates that 98.5% of the residents of Lehigh County are customers of PP&L, and that each could receive a benefit of as much as $289.86.[9] Citing the deposition testimony of Dr. Burton Cohen, a witness expert in psychiatry, GAC argues that the possibility of such a

8. Mr. O'Hara described the effect of the three different rulings by hypothesizing a recovery of $100 million and a Susquehanna plant base of $1 billion. If the recovery were used to reduce the rate base of the plant, Mr. O'Hara calculated that the base would be reduced to $900 million, which at 7% would result in a benefit of $6.3 million in the first year. (Since there are just under 1 million households served by PP&L, the benefit to each in the first year would be approximately $7.) Assuming that inflation would raise the replacement costs of the plant, Mr. O'Hara said that the benefit would increase from year to year. If a reimbursement under the fuel adjustment clause were permitted, according to Mr. O'Hara, the recovery would be taken as a reduction until the entire recovery was exhausted. If the recovery was used to finance additional capital investments, PP&L would have $100 million it might otherwise have to borrow. Assuming an interest rate of 11%, Mr. O'Hara stated that the benefit obtained by this use of the money would be $11 million. R. at 662a-73a. While Mr. O'Hara testified that if a fuel reimbursement were allowed the immediate benefit to a PP&L household would be greater, he also testified that PP&L and the PUC would most likely choose to use any recovery to reduce the rate base of the Susquehanna plant. This use, as Mr. O'Hara described it, and as GAC admits, would result in the distribution of the benefit of any recovery over a longer period. *See* Appellant's Brief at p. 12 n. 13.

9. GAC calculated that an award of $88,642,525.60 to $114,471,031.60 would result in a benefit of $93.60 to $120.88 to each PP&L household. PP&L denied that any benefit would occur, but asserted that if one were to occur, it would be $43.43 to $56.09. Based upon PP&L's new damage claims, *see* note 2 *supra*, GAC now calculates the benefit to be $242.12 to $289.86.

benefit would color the jurors' perception of the evidence and prejudice them against GAC.[10]

PP&L disputes GAC's argument on several grounds. It disagrees with GAC's calculation that 98.5% of the residents of Lehigh County are customers of PP&L. PP&L argues instead that only 44.9% of the residents are its customers. PP&L also argues that the possibility of any customer receiving any benefit is speculative, as no one can foresee the future actions of the PUC, and that even if the PUC were to rule in such a way that any recovery would benefit the customers and not the shareholders of PP&L, the immediate impact upon any individual juror would be negligible, as any such benefit would likely be spread over a period of several years. PP&L also argues that the jury could not be prejudiced against GAC and in favor of PP&L as there is no evidence that the people of Lehigh

10. Dr. Cohen was questioned as follows:

Q. In your professional opinion, assuming that an average person sitting on a Lehigh County jury believes, either consciously or subconsciously, that he may benefit by between $43 and $120 from a verdict for PP&L, is it probable that such a belief would bias the juror in PP&L's favor?

A. I believe it would.

Q. Okay. I'll ask you another question. In your professional opinion, assuming that a juror is biased either consciously or subconsciously in favor of PP&L, is it probable that such a bias would color the juror's perception, interpretation and analysis of the evidence presented to him in the course of a trial?

A. Again I believe that there would be a bias existing under those circumstances as well.

* * *

Q. In your professional opinion, Professor Cohen, assuming that a juror is biased, either consciously or subconsciously, in favor of PP&L, is it probable that such a bias would color the juror's perception, understanding and application of rules of law presented to him by the Court in the course of a trial?

A. I would suspect it's entirely possible.

R. at 722a-24a.

County believe[11] that a recovery for PP&L would represent a benefit to PP&L's customers.[12]

The issue may be framed in two arguments: (1) that Pennsylvania law entitles GAC to a change of venue;[13]

11. PP&L also argues that Professor Cohen's testimony was inadmissible and incompetent because it was based on an assumption, not in evidence, that the jurors would know or believe that they could benefit from a recovery by PP&L. Since this objection was not made below we shall not consider its validity but will treat the professor's testimony as admissible.

12. PP&L also argues that acceptance of GAC's argument would amount to holding that every potential juror in the entire Commonwealth would have a disqualifying interest in the case because of PP&L's membership in the Pennsylvania-New Jersey-Maryland Interconnection (PJM) and the purchase by the Allegheny Electric Cooperative (Allegheny Coop) of a 10% interest in the output of PP&L's Susquehanna nuclear plant.

The PJM is an organization of eleven electric utilities that sell electric power to one another. The PJM has members in and covers most of Pennsylvania and Maryland, all of New Jersey, Delaware and the District of Columbia, and a portion of Virginia. A member utility, in time of need, may buy electric power from another member utility. Thus electric power produced by PP&L's Susquehanna plant could be used by another utility in the PJM. The Allegheny Coop is an association of some fourteen rural electric cooperatives with customers in many of the counties of the Commonwealth.

PP&L argues that if a recovery by it in this action were used to reduce the rate base of the Susquehanna nuclear plant, as predicted by Mr. O'Hara, then all of the customers of members of the PJM and all of the customers of members of the Allegheny Coop would benefit. PJM members would benefit because rate charges for power supplied from one member utility to another are based upon operating costs including fuel charges. Allegheny Coop members would benefit because of their 10% ownership of the plant and the reduced rate base.

GAC disputes PP&L's explanation of the rate charging system of the PJM. GAC also asserts that even if any benefit would flow to a customer of a PJM or Allegheny Coop member utility, this benefit would be much less substantial than the benefit received by a direct customer of PP&L, and further, that the customer of the PJM or Allegheny Coop member utility would not receive his electric bill from PP&L but from his own utility and thus would not identify his interest with PP&L's interest as readily as would a direct customer of PP&L.

13. GAC does not request that venue be transferred to a county where no veniremen are customers of PP&L but only to

and (2) that by forcing it to stand trial before a Lehigh County jury, the lower court has violated GAC's right to due process of law as guaranteed by the fourteenth amendment of the United States Constitution.

—1—

The Pennsylvania Constitution provides that "[t]he power to change venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law." Pa. Const. art. 3, § 23. This provision did not affect the Supreme Court's inherent power to grant a change of venue, but gave the legislature the right, by statute, to confer such power upon the trial courts. *Apex Hosiery Co. v. Philadelphia County,* 331 Pa. 177, 200 A. 598 (1938); *Commonwealth v. Sacarakis,* 196 Pa. Superior Ct. 455, 175 A. 2d 127 (1961).[14] The statute by which the legislature conferred such power in a civil case [15] is the Act of March 30, 1875, P. L. 35, §§ 1-3, *as*

13. (Cont'd.)
some county where less than a majority of the residents receive electricity directly from PP&L. According to a table included in the appendix to GAC's Reply Brief, there are several counties in the eastern part of the state, including Delaware, Montgomery, and Philadelphia, where less than 50% of the residents receive their electricity from PP&L.

14. The Supreme Court's inherent power to grant a change of venue is based on the Act of May 22, 1722, which provided the Court with the powers of the English Court of King's Bench. *See* Apex Hosiery Co. v. Philadelphia County, *supra.* The inferior county courts had no such inherent power. Apex Hosiery Co. v. Philadelphia County, *supra* at 178, 200 A. at —; Wattson v. Chester & Delaware R. R. Co., 83 Pa. 254, 256-57 (1877); Commonwealth v. Sacarakis, *supra* at 462, 175 A. 2d at —; *see* Lee v. Lehigh County, 35 Leh. L. J. 310 (1973); Schelhaus v. Pennsylvania Truck Lines, Inc., 109 P. L. J. 300 (1962).

15. There is also a statute for criminal cases. *See* Act of March 18, 1875, P. L. 30 § 1, 19 P. S. & 551. *See also* Commonwealth v. Casper, — Pa. —, 392 A. 2d 287 (1978) (due process right to fair trial); *Commonwealth v. Rolison,* 473 Pa. 261, 374 A. 2d 509 (1977) (plurality opinion) (due process).

amended, Act of March 18, 1909, P. L. 37, § 1, 12 P. S. §§ 111-113 (1953).[16] Pertinent to GAC's application for a change of venue in this case is the fifth subsection of section 1 and subsections I and III of section 3 of the Act. The fifth subsection of section 1 provides;

> Changes of venue shall be made in any civil cause in law or in equity, depending in any of the courts of this Commonwealth, in the cases following; namely—
>
> * * *
>
> Fifth. Whenever a large number of the inhabitants of the county, in which cause is pending, have an interest in the question involved therein, adverse to

16. Effective June 27, 1980, the Act of March 30, 1875, will be repealed, *see* Judiciary Repealer Act, Act of April 28, 1978, P. L. 202, No. 53, 42 Pa. C. S. §§ 20002(a) [657], 20004(b), and replaced by section 5106 of the Judicial Code, Act of July 9, 1976, P. L. 586, No. 142, 42 Pa. C. S. § 5106, which provides that "[t]he power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided or prescribed by law."

While resolution of the present case is controlled by the Act of 1875, 12 P. S. §§ 111-113, a problem may be foreseen with respect to section 5106 of the Judicial Code. This section is very similar to section 23 of article 3 of the Constitution in that it merely provides that venue may be changed as provided by law. In Wattson v. Chester & Delaware R. R. Co., *supra* at 256-57, the Supreme Court indicated that the trial court could not grant a change of venue under section 23 of article 3 of the Constitution absent specific statutory authorization. *See also* Commonwealth v. Sacarakis, *supra* at 464, 175 A. at — (trial court has no inherent power to grant a change of venue and cannot act in absence of statute. If the power of the trial courts to grant a change of venue is a creature of statute, *see* Little v. Wyoming County, 214 Pa. 596, 63 A. 1039 (1906) (manner in which power to grant change of venue may be exercised is entirely under legislative control, then, upon the repeal of the Act of 1875 and its replacement with section 5106 of the Judicial Code, a party in a future case who wishes to challenge a trial court's order granting a change of venue may argue that the court had no power to enter the order because no legislative act—no "law"—had been enacted providing the court with such power.

> the applicant, and it shall appear to the court that he cannot have a fair and impartial trial.
>
> 12 P. S. § 111.

Subsections I and III of section 3 provide:

> Changes of venue may be made in any civil cause in law or equity depending in any of the courts of this commonwealth in cases following, to wit:
>
> I. Whenever it shall appear to the satisfaction of the court in which such cause is depending, that any party to such cause hath an undue influence over the minds of the inhabitants of the said county, or that they are prejudiced against the applicant, so that a fair and impartial trial cannot be had.
>
> ° ° °
>
> III. Whenever it shall be made to appear to the court that a fair and impartial trial cannot be had in the county in which any such cause is depending.
>
> Applications for change of venue under the provisions of this section shall be made to the court in term time in the manner provided in the second section of this act, and notice of the same having been given to the opposite party or his attorney, the court shall proceed to hear the parties by counsel, and affidavits if necessary, and may refuse or award such change of venue, as in its discretion it shall see fit.
>
> 12 P. S. § 113.

A change of venue under the fifth subsection of section 1 is mandatory. *Everson v. Sun Co.*, 215 Pa. 231, 64 A. 365 (1906); *Little v. Wyoming County*, 214 Pa. 596, 63 A. 1039 (1906); *Willoughby v. Buffalo, Rochester & Pittsburg Ry. Co.*, 203 Pa. 243, 52 A. 188 (1902). If the lower court "is satisfied of the truth of the facts alleged" in the application, 12 P. S. § 112, the change of venue "*shall* be made . . . if it shall appear to the court that the applicant cannot have a fair and impartial trial." 12 P. S. § 111 (emphasis added). *See Everson v. Sun Co., supra; Willoughby v. Buffalo, Rochester & Pittsburg Ry. Co., supra; Manu-mine Research and Development Co. v. Pennsylvania Turnpike Commission*, 79 Dauph. 341 (1964); *Durham Terrace, Inc. v. WKAP, Inc.*, 26 Leh. L. J. 452 (1956).[17] A change of venue under section 3 is not mandatory, however, as the lower court "may refuse or award such change of venue, *as in its discretion* it shall see fit." 12 P. S. § 113 (emphasis added). *See Little v. Wyoming County, supra; Willoughby v. Buffalo, Rochester & Pittsburg Ry. Co., supra.* Thus, while the facts alleged in support of GAC's application raise arguments under both sections 1 and 3, the crucial question is whether GAC has proved that venue should be changed under section 1, for if it has, the lower court had no choice but to grant the application.

A change of venue "is not granted lightly or without real necessity," *Pennsylvania R. R. Co. v. City of Reading,*

17. Before it was amended in 1909, the fifth subsection of section 1 of the act of 1875 provided that venue shall be changed "whenever a large number of the inhabitants of the county in which such cause is pending, have an interest in the question involved therein, adverse to the applicant, *and it shall appear, by the oath of such applicant, that he believes he cannot have a fair and impartial trial*" (emphasis added). Under this earlier version of section 1 it was not "the duty of the court to determine whether the applicant could have a fair and impartial trial in the county where the cause was pending . . . [All that was required was] . . . that it shall appear by the oath of the applicant that he believes he cannot have a fair trial." Willoughby v. Buffalo, Rochester & Pittsburg Rwy. Co., *supra* at 247-48, — A. at —. *See* Little v. Wyoming County, *supra.* Under the Act as amended it is the duty of the lower court to make such a determination; a mere oath by the applicant is no longer sufficient but it must "appear to the court that he cannot have a fair and impartial trial." 12 P. S. § 111.

254 Pa. 110, 117, 98 A. 791, — (1916) (opinion of lower court affirmed *per curiam*); *see Slushy v. Reliance Ins. Co.*, 74 D. & C. 624, 65 Luz. L. Reg. 71 (1974), and the applicant bears the burden of proving that the change of venue is necessary. *Burns v. Pennsylvania R. R. Co.*, 222 Pa. 406, 408, 71 A. 1054, — (1909); *Willoughby v. Buffalo, Rochester & Pittsburg Ry. Co., supra* at 248, 52 A. at —. Therefore, in order to have an application for change of venue under the fifth subsection of section 1 granted, the applicant must prove and the court must find that "a large number of the inhabitants of the county . . . have an interest . . . adverse to the applicant, and . . . that [the applicant] cannot have a fair and impartial trial." *See Eyre v. Berry*, 260 Pa. 518, 520, 103 A. 920, — (1918); *see also Brittain v. Monroe County*, 214 Pa. 648, — A. — (1906); *Willoughby v. Buffalo, Rochester & Pittsburg Ry. Co., supra* at —, 52 A. at — (discussing proof necessary under the Act before the 1909 amendments). In reviewing the application, the lower court is not "compelled to accept as conclusive the [application and] affidavits . . . [alone] but may direct testimony be taken to enable it to ascertain the facts" and to make the required findings. *Brittain v. Monroe County, supra* at 650, — A. at —. Where the facts as found by the lower court are supported by the record, the decision of the lower court shall be respected on appeal. *Everson v. Sun Co., supra.*[18]

18. In denying GAC's original application for a change of venue the lower court entered the following order and memorandum opinion:

> And Now, this 30 day of March, 1976, after argument and a thorough review of the respective briefs, the defendants' petition for a stay of the within proceeding is denied and in view of *Pennsylvania Railroad Company vs. City of Reading*, 254 Pa. 110, 117, 98 A. 791 (1916); *Manu-Mine Research and Development Co. vs. Pennsylvania Turnpike Commission*, 79 Dauphin 341, 345 (1962); as well as *Virginia Electric and*

The number of inhabitants with an interest adverse to the applicant is significant in determining whether venue should be changed because if only a small percentage of the people of a county can be said to have an adverse interest, the applicant may still obtain an impartial jury by using his challenge to eliminate the interested members of the panel of veniremen. By requiring that the adverse interest be held by "a large number of the inhabitants," the legislature made plain that venue should be changed only in a case where the percentage of adversely interested inhabitants is so great that even by using his challenges, the applicant will be unable to obtain an impartial jury. Thus in *Everson v. Sun Co., supra,* the Supreme Court, in affirming the lower court's denial of an application for a change of venue, stated:

> The purpose of the act of 1875 must be kept in view in ascertaining what constitutes in contemplation of the statute a large number of the inhabitants of a county. The legislative intent was to secure to the litigant a jury which would afford him an opportunity to have a fair and impartial trial; and when that cannot be obtained in the county in which the action is pending by reason of the number of the

18. (Cont'd.)
Power vs. Sun Shipbuilding and Dry Dock Co., 389 F. Supp. 568 (E. D. Va. 1975); the motion for change of venue is denied.

The lower court has not filed an opinion pursuant to Rule 1925 of the Pennsylvania Rules of Appellate Procedure, but has instead referred us to the above-quoted order and memorandum opinion as adequately setting forth the grounds for its denial of the application for change of venue and for its denial of the petition for reconsideration. We should have preferred a fuller explanation, in particular, findings of fact would have been helpful. However, in the interest of judicial economy, and because of our concern that there be no more delay in the trial of this case, we shall not remand but shall decide the case on the present record.

inhabitants throughout the county having an interest adverse to him in the question involved, then there is in contemplation of the act "a large number of the inhabitants" having an adverse interest, which requires the court to change the venue. The fact which authorizes a change of venue under paragraph five of section one of the act is that "a large number of the inhabitants of the county," and not of a particular locality in the county, is interested in the controverted question in the cause. The question involved in the present suit arises out of an alleged cause of action which, if it exists at all, exists only in one locality in Delaware county, and affects only those who reside or have property interest in that particular locality. A jury is drawn from the body of the whole county, and where, as here, the persons interested in the question involved in the cause at issue are confined to a particular locality and the number is relatively small in comparison with the population of the whole county, there is no sufficient ground to send the cause to another county for trial. By exercising their right to challenge, the parties can secure a jury which will not be prejudiced on account of the number of people who are interested in the result of the cause. The number of people interested in a pending action may be a large proportion of the population of the community in which the cause of action arose, but it may be a very small proportion of the whole county. It is apparent, we think, that taking into consideration the population of Delaware county and the number of inhabitants in the community who are alleged to be affected by defendant's works, a jury can be obtained from the panel, taken from the whole county, which will have no interest in the cause and which will be strictly impartial.

215 Pa. at 233-34, 64 A. at —. *See Presbyterian Church v. Philadelphia, Bristol & Trenton Street Ry. Co.*, 217 Pa. 399, 400, 66 A. 652, — (1907) (lower court did not err in denying application for change of venue where interest in case was confined to portion of borough and population of borough was less than one-tenth of population of county).

Proof that 98.5% of the possible veniremen in Lehigh County have an interest adverse to GAC would certainly satisfy the "large number of inhabitants" requirement, as in that case only 3 out of every 200 veniremen would be unchallenged. PP&L argues, however, that only 44.9% of the possible veniremen of Lehigh County are its customers, and that very few, if any, of that number would have an interest adverse to GAC.

GAC's 98.5% figure is apparently based upon a calculation using the number of PP&L customers as compared to the number of households in Lehigh County and the population of the households. PP&L's 44.9% figure is apparently based upon a calculation of customers in which the definition of "customer" is limited to each meter or billing name and does not include the other members of the billed customer's household.[19] Thus GAC defines "customer" broadly, as anyone who receives the benefit of electricity supplied by PP&L, while PP&L defines "customer" narrowly, as anyone who is billed for electricity. In the context of determining the number of inhabitants who have an interest adverse to GAC, however, neither figure is very helpful. GAC's 98.5% figure seems too broad

19. PP&L argues that GAC's 98.5% figure is not limited to residential consumers of electricity but also includes industrial and commercial users. Based upon an estimation that 88% of its customers are residential customers, PP&L calculates that it had 88,900 residential customers in Lehigh County as of November 30, 1977, which is 44.9% of the entire population of Lehigh County over eighteen years of age.

as it would apparently include tenants in a multi-family single meter house where the landlord pays the bill sent by PP&L. These tenants do not pay PP&L, but pay for electricity as part of their rent. Thus they would receive no benefit if their landlord's future electric bills were reduced.[20] PP&L's 44.9% figure seems too limited as it would apparently exclude the spouse and other related members of the billed customer's household, although these persons might benefit if the billed customer's electric bills were reduced.

The lower court made no finding as to which figure was correct. *See Presbyterian Church v. Philadelphia, Bristol & Trenton Street Ry. Co., supra* (number of inhabitants is question of fact to be resolved by trial judge). Such a finding would probably be impossible without an examination of data concerning types of housing, and we cannot make it. Its absence, however, is not crucial, for our concern is not to determine the number of veniremen who are PP&L customers, however "customer" may be defined, but the number of veniremen who have an interest adverse to GAC. The fact that a person is a customer of PP&L does not by itself mean that he has an interest adverse to GAC. *Cf. Eyre v. Berry, supra* (fact that majority of inhabitants are Republicans does not mean that defendant cannot obtain fair trial in libel action brought by Republican official).[21] Thus even if GAC's 98.5%

20. At oral argument before this court GAC argued that the rents of these tenants would be reduced if their landlords were to receive the benefit of reduced electric bills. This is not a very realistic argument.

21. Indeed, acceptance of the proposition that every consumer of electricity supplied by PP&L should be deemed to have an interest adverse to GAC would constitute an acceptance of the proposition that all of the customers of all of the PJM member utilities and all of the customers of the Allegheny Coop member utilities would have such an adverse interest. *See* note 12 *supra.*

figure is accepted as correct, we still must determine how many of those customers have an interest adverse to GAC.

GAC's argument is that all of the 98.5% have an interest adverse to it. However, we find this argument deficient in several respects.

Fundamental to the notion of interest as argued by GAC is the assumption that PP&L will pass any recovery back through to its customers either by reimbursement or reduced electric rates. This assumption is questionable, for its correctness depends upon a future decision by a third party, the PUC, which decision no one can predict with any certainty. Thus there can be no present benefit to PP&L customers but only the possibility of a future benefit. As such the customers' interest is speculative. See *Brittain v. Monroe County, supra* (interest of taxpayers speculative); *see also Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 389 F. Supp. 568 (E. D. Va. 1975) (possible interest in award contingent on future decision by state regulatory commission is speculative).

Another questionable assumption in GAC's argument is that the benefit to PP&L customers would be substantial.[22] While GAC has argued that the benefit to each

22. The fact that the benefit to each PP&L customer will be substantial represents an important part of GAC's argument. The alleged substantiality of the benefit is one way in which GAC attempts to distinguish a direct PP&L customer from a PJM or Allegheny Coop utility customer, *see* note 12 *supra*, one way in which it attempts to distinguish a public utility customer from a taxpayer, *see* note 24 *infra*, and one way in which it attempts to distinguish those cases adverse to its position. *See* In re Virginia Electric & Power Co., 539 F. 2d 357 (4th Cir. 1976); Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 389 F. Supp. 568 (E. D. Va. 1975). Moreover, GAC does not directly make the broad argument that every public utility customer must be disqualified in every case involving the utility but asserts instead that the magnitude of the possible benefit to the customers in this case requires that the venue of the action be transferred.

customer would be between $43.43 and $289.86, to take PP&L's low figures and GAC's high figures, *see* note 9 *supra*, the deposition testimony of Mr. O'Hara predicted that if the PUC did indeed rule that the recovery could go to PP&L customers, any such benefit could be spread over a period of years. Thus GAC's proof did not demonstrate that a venireman will immediately get a sum certain but only that a venireman who remains a PP&L customer may over a period of years receive some benefits in the form of reduced electric rates. This interest, unlike the interest of an employee or shareholder of a corporation,[23] is much like the interest of taxpayers whose taxes might be affected by their judgment as jurors in a case involving the county: "too shadowy, indirect, remote and contingent to be within the rule that a man cannot be a judge in his own case." *Brittain v. Monroe County, supra* at 651, 63 A. at 1077; *see Pennsylvania R. R. Co. v. City of Reading, supra* at 117, 98 A. at 793 (interest under Act of 1875 does not mean interest of a taxpayer).[24]

23. *See* Seeherman v. Wilkes Barre Co., 255 Pa. 11, — A. — (1916) (shareholder of corporation incompetent to serve as juror in case in which corporation has interest); Hufnagle v. Delaware & Hudson Co., 227 Pa. 476, — A. — (1910) (challenges for cause sustained against two panel members who were employees of defendant). A shareholder, unlike a public utility customer, has a direct ownership interest in the corporation and can reasonably be assumed to consider the interest of the corporation as his own.

24. The Supreme Court's decision in Brittain v. Monroe County, *supra*, that the interest of a taxpayer as taxpayer would not qualify as an adverse interest under the Act of 1875, 12 P. S. § 111, was consistent with two earlier statutes concerning taxpayers as jurors. The Act of 1834 provided:

> No person shall be deemed incompetent to serve as a juror, in any suit or prosecution upon any penal act of assembly, by reason of his being subject to any tax which would be diminished by the recovery which may be had in such a case.
>
> Act of April 14, 1834, P. L. 333, § 151, 17 P. S. § 1172 (1962).

Considering both the speculative nature of the benefit and the fact that its immediate impact may be insignificant, we must agree with PP&L that GAC's argument that the veniremen have an interest adverse to it is tenuous. In *In re Virginia Electric & Power Co.*, 539 A. 2d 357 (4th Cir. 1976), the United States Court of Appeals for the Fourth Circuit was confronted with a situation similar to that with which we are confronted. The question was whether the district judge should have recused himself in a case where the electric utility (VEPCO) that served him was claiming $152,000,000 in damages, recovery of which could result in a refund of between $70 and $100 to the judge. In holding that recusal was not required, the Fourth Circuit compared the interest of the judge to a mere bare expectancy and stated:

24. (Cont'd.)

The Act of 1840 provided:

> No person shall be excluded from being a witness or juror in any suit, prosecution or proceeding in which any county, city, incorporated district, borough or township, is a party, or is interested, by reason of such person being or having been an officer, rated citizen or inhabitant in such county, city, district, borough or township, or owning assessed or taxable property, or being liable to the assessment or payment of any tax therein.
>
> Act of April 16, 1840, P. L. 410, § 6, 17 P. S. § 1173 (1963).

Both of these acts were repealed, effective June 27, 1978, by the Judiciary Repealer Act. 42 Pa. C. S. §§ 20002(a) [135], [169] (Supp. 1978). Section 5946 of the New Judicial Code, 42 Pa. C. S. § 5946, replaces them and is substantially similar to the Act of 1840.

GAC contends that the legislative exception for taxpayers is consistent with the valid public policy that the county should not have to bring every one of its actions in a different county. Citing the fact that there is a specific legislative exception for taxpayers, GAC argues that the interest of taxpayers is the *only* type of interest which is excepted and that any other type of interest should result in disqualification. This argument proves too much, for acceptance of it would lead to the conclusion that every public utility customer should be deemed to be interested. *See* note 21 *supra*. Moreover, it was not the fact that the jurors were taxpayers that led to the holding in Brittain v. Monroe County, *supra*, but the fact that their interest was too remote and contingent to result in disqualification.

> We are inclined to agree with the district court that $70 to $100 cash in hand is not *de minimis*. But when the possibility of recovering that amount is spread over the next 40 years, is dependent upon VEPCO winning the lawsuit and the full amount claimed, collecting the judgment, and the Virginia State Corporation Commission requiring VEPCO to return increased fuel costs to its customers, we doubt that anyone other than Jimmy the Greek would offer anything for the judge's chance. A reasonable man would doubtless prefer a $2 ticket at Churchill Downs on the first Saturday in May.
>
> 539 F. 2d at 368.

See also Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., supra.

One other assumption critical to GAC's argument is that the Lehigh County veniremen believe, or, when the jury would be selected, would believe, that they will benefit from a recovery of damages by PP&L. GAC has offered no evidence that would support a finding of such a belief, as, for example, any newspaper reports or other types of publicity indicating that a recovery by PP&L would benefit its Lehigh County customers. *See Long Island Light Co. v. New England Petroleum Corp.*, 80 Misc. 2d 183, 362 N. Y. S. 2d 350 (1974) (newspapers reported that recovery by utility would result in rebate to utility's customers).[25] Moreover, we do not find it

25. GAC contends that some of the evidence that will be admitted at trial will sow the seeds of prejudice in jurors who are PP&L customers by informing them that any recovery by PP&L would redound to the benefit of PP&L customers. The only example GAC presents of this type of evidence is the PP&L prospectus filed with the Securities and Exchange Commission on July 10, 1974, where PP&L allegedly admitted that it did not have a contract with GAC. The statement that GAC contends will sow the seeds of prejudice is as follows:

realistic to assume that every public utility customer automatically assumes that a recovery by a utility in a civil suit will inure to the benefit of the utility's customers.[26]

GAC argues, however, that it will be impossible to test the beliefs or knowledge of the Lehigh County veniremen without specifically questioning them concerning their possible interest, thereby causing harm to GAC because "[t]o even examine jurors concerning such an assumption on *voir dire* would raise the danger of unduly emphasizing prejudicial material." *Long Island Lighting Co. v. New England Petroleum Corp., supra* at —, 362 N. Y. S. 2d at 355. We recognize that sometimes, in questioning a panel of veniremen in order to determine

25. (Cont'd.)

> Fuel Adjustment Clause. The Company's tariffs include fuel adjustment clauses which adjust prices for electric service to the Company's customers for variations in the cost of fuel used to generate electricity. Since fuel adjustment clause charges are based on average fuel costs for the three-month period ending the second month prior to the month of billing, increases in the level of fuel costs are not fully reflected in revenues from customers until four months after the increased level of fuel costs are charged to expense. The Company does not follow a practice of fuel cost deferral accounting and consequently, earnings for the twelve months ended April 30, 1974 were reduced by approximately 35 cents per share as a result of this four-month delay. Prices at which power is sold to neighboring utilities reflect the current price of fuel burned.
>
> Supp. R. at 34b.

We do not believe that this single paragraph, which is contained in a prospectus of many pages, would indicate to any juror that a recovery by PP&L would result in a benefit to a PP&L customer.

26. Mr. O'Hara testified that most people don't like utilities, R. at 702a, which is consistent with the observation by the court in Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., *supra*, that "[h]eretofore the complaint most often heard was that jurors would give inordinately high verdicts *against* utilities, since utilities 'had plenty of money'". 389 F. Supp. at 571 (emphasis in original).

whether there is prejudicial belief, counsel may risk sowing the seeds of the very prejudice he is asking about. Here, however, we are not persuaded that this risk is so substantial that venue must be changed. For example, it seems to us that a full explanation might be given by GAC, PP&L, or the lower court, informing the veniremen that any benefit to them is a mere possibility, depending on a ruling by the PUC, and that even if such a benefit were to be granted, it would probably be spread over a period of years. If after this explanation the court is satisfied from the veniremen's responses that they can try the case impartially, they should be permitted to sit as jurors. By combining questioning with a full explanation, GAC should be able to remove any preconception of a large benefit and replace it with knowledge that an individual's expectation of receiving anything is rather slight. Such knowledge should not in our view bar a juror from deciding the case impartially, just as a juror's knowledge that he is a taxpayer should not bar him from sitting in a case involving the taxing entity. *See Pennsylvania R. R. Co. v. City of Reading, supra; Brittain v. Monroe County, supra.* In making these remarks we do not presume to dictate to counsel. If the approach to *voir dire* that we have suggested is not satisfactory to counsel, we leave it to them and the lower court to find some means of dispelling any venireman's preconceptions, while at the same time avoiding the creation of prejudicial suspicions.[27]

GAC further argues that its application for a change of venue should be granted to avoid the appearance of impropriety. We agree with GAC that appearance may be significant, as "'[a]ny tribunal . . . must not only be

27. Given the high calibre of counsel for both sides, we expect full cooperation between them in any efforts to determine whether the veniremen have any prejudicial beliefs.

unbiased but must avoid even the appearance of bias.'" *Gardner v. Repasky,* 434 Pa. 126, 129, 252 A. 2d 704, 706 (1969), *quoting Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U. S. 145, 150 (1968); *see Keystone Ins. Co. Appeal,* 224 Pa. Superior Ct. 404, 406, 307 A. 2d 55, 56 (1973); *Donnon v. Downingtown Civil Service Comm.,* 3 Pa. Commw. Ct. 366, 368, 283 A. 2d 92, 93 (1971). However, we cannot find that a trial by a Lehigh County jury in this case would appear improper. GAC's argument that it would is based upon the assumption that the PP&L customers in Lehigh County have an interest in the case adverse to GAC, and we have held this interest to be too contingent, and possibly insignificant, to "raise [GAC's] contention of bias from the realm of speculation to the realm of fact." *Dennis v. United States,* 339 U. S. 162, 168 (1950).

GAC's final argument is that the possibility and appearance of prejudice, as shown on the record, are sufficient to require that venue be changed because they outweigh the interest of PP&L in having the case tried in the forum of its choosing.[28] This argument also must be rejected. As plaintiff PP&L had the right "to choose the place of suit [and its] choice of forum should not be disturbed except for weighty reasons.'" *Walker v. Ohio River Co.,* 416 Pa. 149, 152, 205 A. 2d 43, 45 (1964), *quoting Plum v. Tampax, Inc.,* 399 Pa. 553, 561, 160 A. 2d 549, 553 (1960). A change of venue may be required for such "weighty reasons" as are identified in the Act of

28. GAC argues that PP&L's interest in having this case tried in Lehigh County is very weak because the witnesses and sources of proof are scattered all over the nation, PP&L's trial counsel is in Philadelphia, the documentary evidence, because of discovery, is located in Philadelphia, and the costs of holding trial outside of Lehigh County will be negligible, particularly in view of the magnitude of this case. PP&L argues that because its corporate headquarters, files, and documents are in Lehigh County, its choice of Lehigh County as the forum for the action should be respected.

1875, but the question of whether an application for a change of venue should be granted is not decided by balancing the interests of the parties.[29] PP&L did not have to prove that its reasons for bringing the action in Lehigh County outweighed GAC's reasons for wanting the venue of the action changed; instead the burden was on GAC to prove that it was entitled to have the venue of the action changed.

GAC has particularly urged upon us the trial court's decision in *Long Island Lighting Co. v. New England Petroleum Corp., supra.* In that case Long Island Lighting Company (LILCO) brought an action in Nassau County against the New England Petroleum Corporation (NEPCO) seeking $62,000,000 in damages. LILCO provided power to 95% of the residents of Nassau County. The action was a result of the scarcity of fuel caused by the Arab oil embargo. LILCO also had brought an action for $186,000,000 treble damages in federal court against several oil companies based upon the same transaction. Newspapers, including the New York Times, the Wall Street Journal, and Newsday, had reported both actions and had carried a statement by a LILCO spokesman that any recovery would result in a direct rebate to LILCO customers. The reports did not distinguish between the state and federal actions with respect to the promised rebate. Faced with these facts, the trial court granted NEPCO's application for a change of venue.

We find this case distinguishable in the important respects that in it there was extensive publicity about the

29. GAC's arguments with respect to convenience and the necessity of having the trial in Lehigh County might be appropriate in support of an application for a change of venue under the doctrine of *forum non conveniens* as embodied in Rule 1006(d) of the Pennsylvania Rules of Civil Procedure. GAC has not made a *forum non conveniens* argument. Regarding the likelihood of such an argument being successful, *see* Tarasi v. Settino, 223 Pa. Superior Ct. 158, 298 A. 2d 903 (1972).

litigation and the newspapers had carried statements that a recovery would result in a rebate to LILCO customers. Thus there was both an atmosphere of prejudice, in a general sense, and the additional specific fact that the people of Nassau County had been informed that they had an interest in the case. Here, by contrast, there has been no extensive publicity prejudicial to GAC,[30] nor any statement to Lehigh County residents that they can expect a rebate if PP&L wins. *See County of Nassau v. Southside Hospital,* 89 Misc. 2d 1063, 393 N. Y. S. 2d 512 (1977) (distinguishes *Long Island Lighting v. New England Petroleum Corp., supra,* on several grounds including that there was extensive prejudicial publicity and that the financial ramifications of the case had been widely reported).

Neither are we persuaded by GAC's citation of *M & A Electric Power Cooperative v. Georger,* — Mo. —, 480 S. W. 2d 868 (1972), and *Ozark Border Electric Cooperative v. Stacy,* 348 S. W. 2d 586 (Mo. App. 1961). Those cases involved the disqualification of members of cooperatives, who, under Missouri law, were treated not only as customers but also shareholders in the cooperatives having "a direct interest of a proprietary nature" in the outcome of the litigation. *M & A Electric Power Cooperative v. Georger, supra* at —, 480 S. W. 2d at 873. *See Seeherman v. Wilkes Barre Co., supra.*

We therefore conclude that GAC failed to meet its burden of proof, and find no error in the lower court's denial of the application for change of venue under the fifth subsection of section 1 of the Act of 1875. It follows from this conclusion that GAC has also failed to prove that

30. In its original application for change of venue GAC alleged prejudicial pre-trial publicity, *see* note 1 *supra,* but it has not raised a prejudicial publicity argument on this appeal, *see* note 3 *supra.* Moreover, the newspaper reports attached to GAC's original application were not nearly as prejudicial as those involved in Long Island Lighting Co. v. New England Petroleum Corp., *supra.*

the lower court abused its discretion in denying the application for change of venue under subsections I and III of section 3 of the Act. As has been discussed, under subsections I and III the lower court was empowered to "refuse or award such change of venue, as in its discretion it shall see fit." It is therefore more difficult for an appellant whose application for change of venue has been denied to show error under subsections I and III of section 3 than under the fifth subsection of section 1.

—2—

GAC's argument that the lower court has violated its right to due process of law as guaranteed by the fourteenth amendment of the United States Constitution also fails to persuade us.

While it is settled that "[t]he constitutional standard of fairness [under the due process clause] requires that a defendant have 'a panel of impartial, indifferent jurors,'" *Murphy v. Florida,* 421 U. S. 794, 799 (1975), *quoting Irvin v. Dowd,* 366 U. S. 717, 722 (1961), GAC has the burden of proving that it cannot obtain such a panel in Lehigh County. *See Irvin v. Dowd, supra.* GAC's argument with respect to due process, like its argument with respect to change of venue under the Act of 1875, depends upon its contention that the veniremen of Lehigh County have, and believe that they have, an interest in the case adverse to GAC. We have concluded, however, that GAC has not shown such an interest. While it is true that a violation of due process may be found where the tribunal has a pecuniary interest in the outcome of the case such that unfairness by the tribunal can be assumed, *see Tumey v. Ohio,* 273 U. S. 510 (1927),[31] we will not assume un-

31. In Tumey v. Ohio, *supra,* the Supreme Court held that a due process violation occurred where the mayor of the village was permitted to retain court costs if he found the defendant guilty in the mayor's court.

fairness, and therefore will not find a violation of due process, where the only interest shown is a speculative and perhaps insignificant possibility of some future benefit.[32] As to GAC's concern that some of the PP&L customers believe that they will benefit, this belief, if indeed it does exist, is something that we believe can be satisfactorily discovered on *voir dire.*[33]

Affirmed.

WIEAND, *J.*, did not participate in the consideration or decision in this case.

VAN DER VOORT, *J.*, concurs in the result.

32. In Tumey v. Ohio, *supra,* the Supreme Court stated that the disqualifying interest must be "direct, personal, substantial and pecuniary" and not "remote, trifling and insignificant." 273 U. S. at 523, 531.

33. PP&L argues that the right to challenge a prospective juror after *voir dire* defeats GAC's argument that its right to due process has been violated. PP&L points out that the cases relied upon by GAC all involved situations where there was no right to challenge the fact finder. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U. S. 145 (1968) (arbitration panel member with adverse interest); Tumey v. Ohio, *supra* (mayor as judge); Horn v. Township of Hilltown, 461 Pa. 745, 337 A. 2d 858 (1975) (zoning board member); Schlesinger Appeal, 404 Pa. 584, 172 A. 2d 835 (1961) (disbarment committee).

APPENDIX B

COURT OF COMMON PLEAS
OF LEHIGH COUNTY
CIVIL ACTION—LAW

No. 453 JANUARY TERM, 1975

PENNSYLVANIA POWER & LIGHT COMPANY,
Plaintiff

v.

GULF OIL CORPORATION,
SCALLOP NUCLEAR, INC. and
GENERAL ATOMIC COMPANY,
Defendants

Order

AND NOW, this 21st day of June, 1978, after argument, IT IS ORDERED AND DECREED as follows:

1. Plaintiff shall produce and deliver to the defendants the documents and communications listed in the attached Schedule A.

2. Defendants shall produce and deliver to the plaintiff the documents listed in the attached Schedule B.

3. Defendants' objections to questions previously posed to L. James Colby, Jr. by the plaintiff be, and the same are hereby overruled, and the aforesaid deponent is directed to answer said questions.

4. Plaintiff's objections to questions previously posed to William A. Frederick and William G. Gibbard by the

defendants be, and the same are hereby overruled, and the aforesaid deponents are directed to answer said questions.

5. Defendants' motion for reconsideration of venue be, and the same is hereby denied.

6. Plaintiff's motion for sanctions for failure of defendants to answer interrogatories be, and the same is hereby denied.

By THE COURT:

/s/ DAVID E. MELLENBERG
David E. Mellenberg,
Judge

APPENDIX C

COURT OF COMMON PLEAS
OF LEHIGH COUNTY
CIVIL ACTION—LAW

No. 453 JANUARY TERM, 1975

PENNSYLVANIA POWER & LIGHT COMPANY,
Plaintiff

v.

GULF OIL CORPORATION,
SCALLOP NUCLEAR, INC. and
GENERAL ATOMIC COMPANY,
Defendants

APPEARANCES:

BRYAN A. SNAPP, ESQUIRE, with him
PEPPER, HAMILTON & SCHEETZ,
On Behalf of Plaintiff

THOMAS J. CALNAN, JR., ESQUIRE, with him
DECHERT, PRICE & RHOADES
On Behalf of Defendants

Memorandum Opinion

The court by Order and supporting Opinion dated March 30, 1976 denied defendants' motion for change of venue. After oral argument and consideration of briefs, this Court on June 21, 1978 denied defendants' Petition

for Reconsideration of its Motion For Change of Venue and found the original Opinion to be dispositive of the matter.

Under these circumstances the Court finds it unnecessary to submit an Opinion in accordance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

By THE COURT:

/s/ DAVID E. MELLENBERG
David E. Mellenberg,
Judge

DATED: March 1, 1979

APPENDIX D

COURT OF COMMON PLEAS
OF LEHIGH COUNTY
CIVIL ACTION—LAW

No. 453 JANUARY TERM, 1975

PENNSYLVANIA POWER & LIGHT COMPANY,
Plaintiff

v.

GULF OIL CORPORATION,
ROYAL DUTCH/SHELL GROUP,
SCALLOP NUCLEAR, INC. and
GENERAL ATOMIC COMPANY,
Defendants

Order

AND Now, this 30 day of Mar., 1976, after argument and a thorough review of the respective briefs, the defendants' petition for a stay of the within proceeding is denied and in view of *Pennsylvania Railroad Company vs. City of Reading*, 254 Pa. 110, 117, 98 A. 791 (1916); *Manu-Mine Research and Development Co. vs. Pennsylvania Turnpike Commission*, 79 Dauphin 341, 345 (1962); as well as *Virginia Electric and Power Co. vs. Sun Shipbuilding and Dry Dock Co.*, 389 F. Supp. 568 (E. D. Va. 1975); the motion for change of venue is denied.

By THE COURT:

/s/ JOHN E. BACKENSTOE
J.

APPENDIX E

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SALLY MRVOS
Prothonotary
CATHERINE E. LYDEN
Deputy Prothonotary

456 City Hall
Philadelphia, 19107
(215) 686-3581/84

January 29, 1980

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In re: Pennsylvania Power & Light Company
v. Gulf Oil Corporation, et al.,
Petitioners.
No. 4604 Allocatur Docket

Gentlemen:

This is to advise you that on January 14, 1980 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,
Sally Mrvos
Prothonotary

by /s/ CATHERINE E. LYDEN
Catherine E. Lyden
Deputy Prothonotary

CEL:mb
CC: M. Duncan Grant, Esq.
CC: Bryan A. Snapp, Esq.

APPENDIX F

Excerpt From Memorandum of Law in Support of Defendants' Motion for Reconsideration of Defendants' Petition for Change of Venue and Transfer (Filed January 11, 1978; Court of Common Pleas of Lehigh County, Pennsylvania)

B. Trial in Lehigh County Would Violate Defendants' Rights to Due Process

In *Tumey v. Ohio*, 273 U. S. 510 (1927), the Supreme Court held that trial before a judge with a direct, substantial pecuniary interest in the case violates the fourteenth amendment guarantee of due process. Since *Tumey*, that fundamental precept has been expressly applied to trial before a juror with a pecuniary interest, *Adams v. United States*, 317 U. S. 269, 275 (1942); *Fay v. New York*, 332 U. S. 261, 289 (1947); *Irvin v. Dowd*, 366 U. S. 717, 722 (1961), *United States ex rel. DeVita v. McCorkle*, 248 F. 2d 1, 8 n. 10 (3d Cir.), *cert. denied*, 355 U. S. 873 (1957), and to civil cases, *Commonwealth Court v. Continental Casualty Co.*, 393 U. S. 145, 148 (1968); *Gibson v. Berryhill*, 411 U. S. 564 (1973); *State Dental Council v. Pollock*, 457 Pa. 264, 270, 318 A. 2d 910, 914 (1974).

Recent decisions extending *Tumey* hold that due process is violated even if the fact-finder's interest is not as direct and positive as it appeared to be in *Tumey*. See *Gibson, supra*, 411 U. S. at 579. In fact, even the probability of unfairness violates due process. *In re Murchison*, 349 U. S. 129, 136 (1955). The Supreme Court of Pennsylvania has held that due process is violated whenever the adjudicator has an interest which would represent "a possible temptation . . . to the average man not to hold the balance nice, clear and true," *State Dental, supra*, 457

Pa. at 270, 318 A. 2d at 914 *quoting Tumey, supra*, 273 U. S. at 532.

If this case is tried in Lehigh County, each member of the jury will have an interest in the outcome of the case ranging from $43.43 to $120.00 or more.[5] In the words of *Tumey*, quoted in *State Dental, supra*, such an interest would represent "a possible temptation . . . to the average man not to hold the balance nice, clear and true." Accordingly, due process requires that defendants' motion for a change of venue be granted.

* * *

5. *See* note 2 *supra*.

APPENDIX G

Excerpt From Reply Brief of Defendants to Brief of Plaintiff in Opposition to Defendants' Motion for Reconsideration of Defendants' Petition for Change of Venue and Transfer (Filed March 29, 1978; Court of Common Pleas of Lehigh County, Pennsylvania)

C. The Due Process Clause Requires that the Venue of this Action Be Changed (PP&L's Brief 24-26)

PP&L's discussion of the due process issue does not dispute the constitutional principles set forth in defendants' Memorandum of Law. Instead, PP&L repeats once again its contention that a Lehigh County jury will have no appreciable interest in the outcome of this case. Defendants have refuted that argument in this Brief and they stand on their contention that the due process clause requires a change of venue.

• • •

APPENDIX H

Excerpt From Brief for Appellants (Filed February 2, 1979; Superior Court of Pennsylvania)

II. Trial in Lehigh County Would Violate General Atomic's Rights to Due Process.

The trial of this case to a Lehigh County jury whose members have a pecuniary interest adverse to General Atomic would violate General Atomic's Fourteenth Amendment right to due process of law.

In *Tumey v. Ohio*, 273 U. S. 510 (1927), the United States Supreme Court recognized the constitutional principle that the finder of fact in a judicial proceeding must be unbiased. The Court held that a criminal trial before a judge with a pecuniary interest in the outcome of the case violated due process. Indeed, as the *Tumey* Court pointed out, the premise that the finder of fact must be free from bias antedates the Constitution itself: "There was at common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesmal, in the justices of the peace." 273 U. S. at 525. *Tumey* raised this ancient common law precept to the status of a "*constitutional* principle," *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U. S. 145, 148 (1968) (emphasis in original), "that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge." *Id.* at 148.

The Supreme Court of Pennsylvania has been no less sensitive than the Supreme Court of the United States to the principle that a finder of fact must be unbiased. As the Court held in *Schlesinger Appeal*, 404 Pa. 584, 172 A. 2d 835 (1961) (reversing an order of disbarment on the ground, *inter alia*, that the members of the Committee which heard the charges were biased against Schlesinger),

> "'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . This Court has said . . . that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U. S. 510, 532.'"

404 Pa. at 598, 337 A. 2d at 860, *quoting In re Murchison*, 349 U. S. 133, 136 (1955) (elipses inserted by the Court in *Schlesinger*). In *Horn v. Township of Hilton*, 461 Pa. 745, 337 A. 2d 858 (1975), the Court applied the *Tumey* principle that every tribunal must be free from bias to a Zoning Hearing Board and reversed an order denying an applicant a zoning variance. In *State Dental Council and Examining Board v. Pollack*, 457 Pa. 264, 318 A. 2d 910 (1974), the Court indicated that the constitutionality of a license suspension hearing before a professional board must be measured against the *Tumey* standard.

No meaningful distinction exists between the present case and the criminal trial of *Tumey*, the zoning hearing in *Horn*, and the licensing hearings in *State Dental Council* and *Schlesinger*. The basic principle that "no man is permitted to try cases where he has an interest in the outcome," repeated so consistently and vigorously by both the Supreme Court of the United States and the Supreme Court of Pennsylvania, should apply with full force to the trial of this case. Due process requires that this case not be tried to jurors who have (or believe they have) a potential economic interest in the outcome of the case.

• • •

APPENDIX I

Excerpt From Reply Brief for Appellants (Filed March 22, 1979; Superior Court of Pennsylvania)

E. General Atomic's Rights to Due Process Are Not Adequately Protected by Its Right to Challenge Individual Jurors on Voir Dire (Reply to pp. 32-37 of PP&L's Brief)

PP&L's due process argument completely ignores the realities of this case. PP&L suggests that merely by asking prospective jurors the correct questions on voir dire, General Atomic will be able to eliminate from the jury all those prospective jurors who may have a prejudicial interest in the outcome of the case. As General Atomic explained in its initial Brief, however, fully 98.5% of the population of Lehigh County are members of households which receive electricity from PP&L and are biased in favor of PP&L.[21] PP&L suggests that General Atomic may ask each juror on *voir dire*: "Do you have any knowledge or opinion as to how PP&L might treat any recovery it may receive in this case?" and then select only those who answered "No". This procedure, of course, would inject into the jurors' minds at the very outset the very thoughts which would produce the bias. Furthermore, even PP&L's proposed method would not prevent the jurors who are selected from acquiring a pro-PP&L bias upon learning during the course of the multi-week or multi-month trial

21. Statistically, given the percentage of Lehigh County jurors who are members of PP&L households, General Atomic would have to engage in a time-consuming voir dire of approximately 1400 prospective Lehigh County jurors before finding 12 jurors and two alternates who were not members of PP&L households. By the time the voir dire was concluded, every juror would understand the financial importance of the case to every individual who lived, worked or had any financial dealings in and around Lehigh County.

the potential enormity of PP&L's claims and the likelihood that a PP&L verdict will be distributed to its customers.

The analogy which PP&L suggests (Brief for Appellee at 36) between the present situation and a criminal case in which a juror is asked on voir dire about racial prejudice, the death penalty, or the guilt or innocence of the defendant based upon newspaper reports is a false one. In none of the cases which PP&L discusses did the evidence to be presented at trial contain the seeds of potential prejudice against the defendant. In none of the cases which PP&L discusses was there a demonstrated bias on the part of 98.5% of the county's veniremen. In none of the cases PP&L discusses did the Court consider whether such widespread prejudice could be cured by voir dire. And finally, in none of the cases PP&L discusses was there available to the court the ready alternative that is available here—transfer to a county where there are few or even no PP&L customers.

F. This Case Can Be Transferred to Any One of the Many Pennsylvania Counties in Which Fewer Than Half the Residents Receive Their Electricity From PP&L (Reply to pp. 37-40 of PP&L's Brief).

As anticipated, PP&L's Brief contains the same argument with respect to the so-called PJM Interconnection which PP&L presented to the court below and which General Atomic answered in its initial Brief. (Brief for Appellants at 24-27)

APPENDIX J

Excerpt From Petition for Allowance of Appeal From the Order of the Superior Court (Filed October 22, 1979; Supreme Court of Pennsylvania)

II. An Appeal Should Be Allowed Because Neither This Court Nor the United States Supreme Court Nor Any United States Court of Appeals Has Ever Established the Point at Which a Civil Litigant's Right to Due Process of Law Is Violated Because of an Adverse Pecuniary Interest on the Part of a Jury.

There must come a point at which an adverse pecuniary interest on the part of every member of a jury in a civil case becomes so unfair that it constitutes a violation of a litigant's constitutional right to due process of law. That point has never been established, however, either by this Court, by the United States Supreme Court, or by any of the United States Courts of Appeals. In fact, neither this Court nor any of the federal appellate courts has even considered the meaning of due process in the context of a civil jury trial.

The Superior Court decided the issue of due process in the present case by equating jurors with judges and quasi-judicial administrative tribunals. Relying on cases concerning biased judges and administrative tribunals, the Superior Court held that "a speculative and perhaps insignificant [but perhaps significant] possibility of some future benefit" [15] to every juror if he renders a verdict for the plaintiff does not violate the defendant's due process rights.

Decisions involving judges or administrative tribunals are not conclusive on the question of juror bias. The law

15. *See* note 7, *supra*.

has long recognized that the same prejudicial evidence which a judge is presumed capable of disregarding may lead to reversible error if admitted in a jury trial.[16] *See McCormick on Evidence,* § 60 (2d ed. 1972).

The question of due process in a civil jury trial justifies appellate authority and guidelines which this Court can provide only if it allows an appeal in the present case.

* * *

16. For this reason, the Superior Court's reliance (21 app, 22 app) on *In re Virginia Electric & Power Co.*, 539 F. 2d 357, 368 (4th Cir. 1978), is misplaced. That case involved disqualification of a judge, not bias on the part of a jury. By contrast, General Atomic has never contended that the judge to whom this case is assigned should recuse himself because he is a PP&L customer. To the contrary, General Atomic would have no objection to trying its case before Judge Mellenberg or any other Lehigh County judge specially assigned to a county where less than half the population is served by PP&L.

In re Virginia Electric is distinguishable on another ground as well. The record in that case apparently did not establish that any recovery by the electric company would be refunded to its customers, 539 F. 2d at 368, whereas the record in the present case is conclusive in that regard, *see* note 7, *supra.*

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

K 74-323 CA 8

CONSUMERS POWER COMPANY,
Plaintiff,

v.

COMBUSTION ENGINEERING, et al.
Defendants.

CONSENT ORDER

This cause having come on to be heard on plaintiff Consumers Power Company's respective motions to strike defendant Bechtel's fourteenth affirmative defense and defendant Combustion's nineteenth defense objecting to the venue of this action, and upon consent of all parties expressed at the hearing of this Court held on November 9, 1976, that the case of Consumers Power Company v. Combustion Engineering, et al. K 74-323 CA 8 be transferred for jury trial from the Southern Division to the Northern Division of the United States District Court for the Western District of Michigan; and

It appearing to the Court that a majority of the potential jurors in the Southern Division of the United States District Court for the Western District of Michigan may be direct or indirect ratepayers of plaintiff and, as such, may potentially be influenced by the January 23,

1975 Opinion and Order of the Michigan Public Service Commission specifically referring to this litigation and the possible effect of its resolution on plaintiff's ratepayers; and

It appearing that plaintiff does not provide service to the Northern Division of this District and that the potential jurors residing in the Northern Division are neither ratepayers of plaintiff nor otherwise likely to be affected or influenced by the aforementioned pronouncement of the Michigan Public Service Commission; and

It being the desire of the Court and parties to advance the resolution of this litigation and to avoid a protracted and expensive interlocutory appeal pursuant to the provisions of 28 U. S. C. § 1292(b); and

The Court having determined that such transfer is in the interest of justice and upon the consent of all parties, in accordance with the provisions of 28 U. S. C. § 1404(b); it is,

ORDERED, that the jury trial in K 74-323 CA 8 be held in the United States District Court for the Western District of Michigan, Northern Division, and that the jury panel be selected therefrom.

IT IS FURTHER ORDERED, that all pre-trial hearings and motions continue to be held at a convenient location in the United States District Court for the Western District of Michigan, Southern Division.

/s/ WENDELL A. MILES
Wendell A. Miles,
United States District Judge

Dated: November 24, 1976